Supreme Court, U.S.
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No. 01-1710

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE, INC.,

Petitioner,

v.

JOHN F. BYRNES, *et al.*,

Respondents,

-and-

IRMA M. ALICEA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN F. BYRNES, *et al.*

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals correctly held that retiree life insurance benefits may have vested under the Employee Income Retirement Security Act of 1974 ("ERISA") where the applicable plan documents expressly promised long-term employees who satisfied age and service requirements with "lifetime" welfare benefits.

2. Whether the Second Circuit Court of Appeals correctly held that an employer-fiduciary may violate its fiduciary responsibilities under ERISA when the employer-fiduciary withholds employee welfare benefits in violation of the terms of the employee welfare plan and misrepresents plan benefit information to participants and beneficiaries of the plan.

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COUNTERSTATEMENT OF THE CASE

This case involves enforcing an employer's promise to provide certain long-service employees with vested welfare benefits. Petitioner Empire Blue Cross and Blue Shield ("Empire") made its promise of "lifetime" benefits repeatedly in the welfare plan documents as well as other materials that described the welfare plan benefits. Empire also made the same promise of "lifetime" benefits to certain employees in order to induce them to voluntarily retire early. Although Empire later attempted to nullify its promise through a plan document, the Second Circuit found that after Empire made its promise — and its employees relied on that promise — Empire could not simply pretend that the promise did not exist.

In its continued quest to escape its obligations, Empire has petitioned this Court for a writ of certiorari. In doing so, however, Empire slants the facts of the case and misstates the Second Circuit's decision. With respect to the facts, they are clearly summarized in the Second Circuit's opinion, which has been reprinted in Appendix A of Empire's Petition (1a-24a). For the sake of brevity, Respondents respectfully refer the Court to the decision itself.

As for decision, the Second Circuit fundamentally recognized that Empire cannot, on the one hand, promise vested benefits to certain employees and then, years later, attempt to divest those employees of the benefits. That decision follows the ERISA case law of this Court. Nor does the import of the Second Circuit decision conflict with the case law of other Circuits, as Petitioner strenuously argues. Indeed, every Circuit has adopted the rule that while ERISA does not require employers to provide vested welfare plan benefits, employers are free to provide such vested benefits.

Empire avoids grappling with the oxymoron it has created by mincing words and then failing to admit that the welfare benefits vested. Even though Empire expressly and unconditionally promised the Respondents benefits for the "remainder of their lives", Empire asserts, as its premise in the Petition, that it did not expressly provide vested benefits. Empire then builds upon its incorrect premise to argue that the Second Circuit incorrectly ruled that Empire may be bound under ERISA by what Empire promised. Empire next claims that that ruling creates a major conflict in the circuits and "will lead to harmful results". Empire overstates its case.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present A Conflict in the Circuits

All circuit courts that have reviewed issues relating to the vesting of welfare plan benefits recognize that while ERISA does not require employers to provide vested benefits, employers are free to provide vested benefits if they so choose. *E.g. UAW v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999) (employers may "relinquish their right to unilaterally terminate [welfare plan] benefits and provide for lifetime vesting".); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) ("an employer may 'waive its statutory right to modify or terminate benefits' . . . by voluntarily undertaking an obligation to provide vested, unalterable benefits."); *Wise v. El Paso Natural Gas, Co.*, 986 F.2d 929, 937 (5th Cir. 1993) ("an employer's welfare plan itself may designate a vested benefit"); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667 (6th Cir. 1998) ("employers may choose to vest welfare benefits by entering into a private agreement with their employees that is set forth in the plan documents."); *Bidlock v. Wheelabrator Corp.*, 993 F.2d 603,

604-05 (7th Cir. 1993) ("ERISA does not require the vesting of health or other 'welfare' benefits, as it does pension benefits . . . but equally it does not forbid their vesting by a written contract."); *Jensen v. Sipco, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994) ("an employer may unilaterally modify or terminate medical benefits at any time 'absent the employer's contractual agreement to the contrary'") *quoting Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996) ("an employer or plan sponsor may unilaterally modify or terminate welfare benefits, unless it contractually agrees to grant vested benefits."); *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (the vesting of welfare plan benefits is a matter of "contractual interpretation").

This Court too has recognized that an employer may contractually provide its employees with vested benefits under ERISA. *Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 520 U.S. 510, 513 (1997) (an employer is free to adopt, modify or terminate welfare benefits "unless [the] employer contractually cedes its freedom"). There is thus no conflict over the principle that under ERISA, an employer binds itself to a certain welfare benefit scheme when the employer provides vested benefits.

Because Empire is unable to challenge that well-established rule, Empire looks beyond the rule to create a conflict that does not exist in this case. Empire states that the Second Circuit's approach in construing plan language to determine whether welfare benefits are vested is different from that of other circuits. Specifically, Empire jumps on the fact that the Second Circuit applied a "reasonable interpretation" standard in considering Empire's promise while other circuit courts have followed a "clear and express" standard. While Empire's observation may

be true, it is a distinction without any significance here. Because Empire's promise was clear and express, the promise is enforceable even under the standard that Empire seeks to invoke.

To be sure, Empire promised Respondents over and over again life insurance benefits in an amount no less than their final salary "for the remainder of their lives." The promise was not qualified or conditional. And, the promise was not subject to retraction. Empire did not have to make the promise to Respondents, but it did. It was part of an employee benefit package, which was communicated in the Summary Plan Descriptions and early retirement documents to Respondents. It reiterated that promise in "exit letters" and in other communications. Respondents, in turn, relied on the promise and rendered years of valuable services based on that promise as well as other promises made by Empire or voluntarily left their employment with Empire early. Thus, by any measure, each Respondent should have a right to receive life insurance benefits for the remainder of his/her life, as promised.

Even *Wise*, *supra*, upon which Empire so heavily relies, recognized that if an employer makes an unconditional promise to provide lifetime benefits, the employer may bound to provide the benefits under ERISA. *Wise*, *supra*, 986 F.3d at 937 ("It follows that [the employer] could have waived its statutory right to modify or terminate benefits and vested its workers contractually with the right to receive free lifetime coverage"). *See also Sengpiel v. B.F. Goodrich Co. supra*, 156 F.3d at 668 (where plaintiffs failed to show that they had a right to lifetime benefits due to the fact that the summary plan description did not "expressly guarantee lifetime benefits"); *Gable v. Sweetheart Cup Co., Inc., supra* 35 F.3d at 855 (where the court noted that ERISA authorizes an individual to enforce his "right to a fixed level of lifetime benefits" if such right is stated clearly and expressly in plan documents).

In short, with respect to the facts of this case, the circuit courts are in far more agreement than disagreement. Empire's attempt to exploit certain underlying differences and nuances among the circuit courts is unavailing as those differences are insignificant here. Respondents therefore respectfully submit that this case fails to present a conflict among the circuit worthy of a writ of certiorari.

II. The Second Circuit's Decision is Consistent With ERISA's Policies

Empire further argues in its Petition that ERISA policies would be defeated if an employer is compelled to provide the benefits it promises through plan documents. Nothing could be further from the truth. "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *quoting Shaw v. Delta Airlines Co.*, 463 U.S. 85 (1983). A core component of ERISA's statutory framework are the extensive reporting and disclosure rules that apply not only to pension benefit plans but also to welfare benefit benefits. ERISA §§ 101-111. The fundamental purpose of those rules is to ensure that employees are accurately apprised of the benefits to which they are entitled. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

Empire additionally questions the wisdom of any court decision that might enforce an employer's promise to provide vested welfare plan benefits. Using health insurance as an example, Empire appears to argue that since the marketplace for welfare benefits change over time, a court decision that enforces a long-standing promise to provide welfare benefits could be "dramatic and disastrous". Pet., p. 17. Aside

from the fact that the benefits at issue here involve garden-variety life insurance, rather than health insurance, Empire's argument is beside the point. It is up to an employer to determine whether, in light of ever-changing conditions, it is wise to provide vested welfare plan benefits. ERISA, including the case law thereunder, takes no position on that issue. The authority under ERISA does, however, provide that once an employer promises to provide a vested benefit, the employer must administer that benefit in accordance with the terms of the plan.

Indeed, any opposite result would frustrate the policies of ERISA. One need not look any farther than ERISA § 2, entitled "Findings and Declaration of Policy". That section recites, in relevant part, the express purpose of ERISA as follows:

> (b) It is hereby declared to be in the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

III. The Second Circuit's Decision To Permit Respondents To Proceed Under Both ERISA § 502(a)(3) and ERISA § 502(a)(1)(B) Is Consistent with this Court's Case Law and Does Not Conflict with Other the Decisions of Other Circuit Courts

In making an alternative argument in support of its Petition, Empire again exaggerates distinctions between the Second Circuit decision and that of other circuits. Empire cites *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998) and *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999) for the notion that the Second Circuit decision parts with that of other circuits on the issue of whether the Respondents can recover under ERISA § 502(a)(3) for Empire's breach of fiduciary duty. Empire also suggests that the Second Circuit's decision is not consistent with the spirit of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Empire's position is not accurate.

First, in *Varity*, this Court clearly held that individual ERISA plan beneficiaries may bring an action under ERISA § 502(a)(3). Empire concedes that point. Pet., pp. 20-21. But, Empire then tries to distinguish *Varity* from this case on the ground that the plaintiffs in *Varity* could not bring a claim to recover benefits under ERISA § 502(a)(1) whereas Respondents here did assert such a claim. Empire then deduces that it is inappropriate to allow Respondents to proceed under ERISA § 502(a)(3) with respect to one of their ERISA claims because they proceeded under ERISA § 502(a)(1) with respect to another claim.

Empire misunderstands *Varity* and the Second Circuit's decision. *Varity* does not stand for the proposition that when

an ERISA plan beneficiary asserts a claim under ERISA § 502(a)(1), the beneficiary is then barred from asserting a separate and distinct claim that would otherwise be recoverable only under ERISA § 501(a)(3). Rather, *Varity* stands for the straightforward proposition that when an ERISA beneficiary is injured under ERISA, but recovery for *that* injury is not available under ERISA § 501(a)(1), the beneficiary may seek to recover under ERISA § 501(a)(3). Otherwise, according to this Court, ERISA would deny ERISA plan beneficiaries for injuries.

Here, the Second Circuit found that even though the express language of the ERISA plan documents offer a fact finder a reasonable basis to conclude that the life insurance benefits had vested, should the fact finder fail to reach that conclusion, Empire may still be liable to Respondents for repeatedly providing them with misleading information about their benefits. Pet., Appendix, pp. 19a-22a. After all, an employer, in its capacity as an ERISA fiduciary, has a fiduciary duty to avoid misrepresenting the terms and conditions of its employee benefit plans. *Varity*, 516 U.S. at 506.

In the same vein, the two cases upon which Empire principally relies, *Tolson v. Avondale Industries, Inc.* 141 F.3d 604 (5th Cir. 1998) and *Katz v. Comprehensive Plan of Group Ins.*, 197 F.3d 1084 (11th Cir. 1999), fall far short of any "direct conflict" with the Second Circuit's decision. In *Tolson*, the plaintiff had alleged, based on the terms of two ERISA plan documents, the wrongful denial of benefits under ERISA § 501(a)(1) and a breach of fiduciary duty under ERISA § 501(a)(3). *See Tolson v. Avondale Industries, Inc.* 1997 WL 539919 (E.D. La. August 29, 1997). The second claim, according to the district court, was "essentially the

same as the principal demand". *Id* at *7. As a result, the court found that the plaintiff could not proceed under the ERISA § 501(a)(3) when the same relief was available under ERISA § 501(a)(1). The Fifth Circuit decision adopted the district court's analysis wholesale. *Tolson*, 141 F.3d at 610-611.

Similarly, in *Katz*, *supra*, the circuit court affirmed the district court's finding that an ERISA beneficiary may not bring essentially the same claims under both ERISA § 501(a)(1) and ERISA § 501(a)(3). *Katz*, 197 F.3d at 1088. The circuit court explained that because ERISA § 501(a)(3) was meant to provide relief that cannot be obtained elsewhere under another provision, the beneficiary could not seek relief for an injury that is recoverable under ERISA § 501(a)(1). *Id.*

Thus, neither *Tolson* nor *Katz* conflicts directly (or even indirectly) with the Second Circuit's decision. *Tolson* and *Katz* hold that when an injury is recoverable under ERISA § 501(a)(1), that injury is also not recoverable through a second claim under ERISA § 501(a)(3). Those two cases, however, do not address what happens when an ERISA fiduciary may have had grounds, based on the terms of the plan document, to deny a benefit, but nevertheless misleads an ERISA beneficiary over and over again by misrepresenting the plan terms.

IV. The Second Circuit's Decision Regarding Empire's Fiduciary Status Does Not Result in a Conflict in the Circuits

Empire asserts that the Second Circuit created yet another conflict in finding that Empire's reduction of benefits was a fiduciary act. This argument too can be easily dispelled.

In reducing the benefits, Empire did not merely modify the terms of an ERISA welfare plan, Empire took away a benefit that it had no right to touch. In other words, Empire divested Respondents of a vested benefit. ERISA itself states that an ERISA plan fiduciary must act "in accordance with the documents and instruments governing the plan". ERISA § 404(a)(1)(D). That does not mean, as discussed above, that an employer may not modify the terms of a plan when permitted to do so.

However, when an employer, within the discretion afforded to it by ERISA, provides an unalterable benefit to its employees, the employer, to the extent it is a fiduciary, must follow the terms of the plan. If the employer takes action to administer the plan contrary to the unalterable parts of the plan, the employer — like any other fiduciary — breaches its responsibility.

Almost all of the cases that Empire relies upon are inapposite, as they involved an employer's decision, as a plan sponsor, to make changes to non-vested benefits. Pet., pp. 25-26. That principle is not in dispute here. As for handful of "vested" benefit cases upon which Empire relies, they contain facts that are wholly distinguishable from those in the instant case. In *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994), a question was raised regarding the appropriateness of an employer's amendment of an ERISA pension plan, but the employer served exclusively as the plan sponsor. Unlike Empire, the employer was not the plan administrator.

Empire also refers to *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), for the proposition that even when an employer interferes with vested benefits, the employer's actions are not considered fiduciary in nature. *Hozier*, however,

did not involve an employer's interference with vested benefits. Rather, the employer in that case sought to modify certain severance benefits which, at the time of the attempted modification, had *not* vested. In fact, the *Hozier* court reasoned that although ERISA allowed the employer to modify the non-vested benefits unilaterally, ERISA required the employer to make the modification in writing, a requirement that the employer failed to meet in the case. 908 F.2d at 1162-64. *Hozier* did not address the issue of when an ERISA fiduciary takes action to deprive ERISA beneficiaries of their vested rights.

V. The Second Circuit's Decision That Empire May Have Breached its Fiduciary Duty In Providing Misleading Information Does Not Result in a Conflict in the Circuits

On a final note, Empire asserts that the Second Circuit's finding that Empire may have violated its fiduciary obligation by promising Respondents lifetime benefits, but failing to note that such promise was revocable, is inconsistent with decisions of other circuits. Empire is wrong.

At the outset, Empire misstates the Second Circuit's holding. The Second Circuit merely recognized that a fiduciary may not promise to provide a vested benefit, but then fail to disclose that the benefit is revocable. That would violate, according to the Circuit Court, the fiduciary's duty to engage in honest and fair dealings with the welfare plan participants. Pet. Appendix, p. 212.

None of the decisions that Empire cites in its Petition stand for a contrary proposition. The Eighth Circuit in *Jensen v. Sipco*, 38 F.3d 945 (8th Cir. 1994), for example, merely observed that an ERISA welfare plan fiduciary ordinarily does

not have duty to state that welfare benefits are vested — an observation consistent with the general principle that welfare plan benefits ordinarily do not vest (absent express language). The Eighth Circuit's observation, however, is very different from the notion, advanced by Empire, that an ERISA fiduciary may tell plan beneficiaries that they have "lifetime" benefits, but then remain silent on revocability.

The reference to *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc) is also overstated. In *Sprague*, a purported class of certain retirees instituted an action against General Motors to challenge the company's reduction in its retiree health benefits. In finding that the retirees did not have a vested right to the health benefits at issue, the Eighth Circuit initially explained that "most of the summary plan descriptions unambiguously reserved [the company's] right to amend or terminate the [health care] plan". *Sprague*, 133 F.3d at 401. While not entirely clear from the Circuit Court's opinion, the Eighth Circuit also rejected additional estoppel and fiduciary duty claims made by a subset of retirees (i.e, early retirees) who asserted that the company had made additional representations to them regarding the health benefits. With that factual backdrop, the Eighth Circuit stated that the breach of fiduciary claim against the company could not survive because the company had no obligation under ERISA "to tell the early retirees at every possible opportunity that which it had told them many times before — namely, that the terms of the plan were subject to change". *Sprague*, 133 F.3d at 405. That holding does not mean, however, that the Eighth Circuit would embrace the view that a company is not breaching its fiduciary duty when it repeatedly refers to "lifetime" benefits, but fails to tell the plan beneficiaries, again and again, of a supposed reservation of rights.

Empire thus may not rely on other Circuit Court decisions as support for the principle that ERISA permits a fiduciary to recite a half of a promise and other information that would mislead plan beneficiaries with impunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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